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 U.S. DISTRICT COURT
 DISTRICT OF COLORADO

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CLERK OF COURT

 IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF COLORADO

BY _____ DEP. CLK

 THE UNITED STATES OF AMERICA
 and THE STATE OF COLORADO,

Plaintiffs,

v.

ASARCO, INCORPORATED,

Defendant.

Civil Action No. 04-RB-2070 (CBS)

**UNITED STATES' MEMORANDUM OF POINTS AND AUTHORITIES
 IN SUPPORT OF ITS MOTION FOR ENTRY OF CONSENT DECREE**
I. INTRODUCTION

The United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), respectfully submits this Memorandum of Points and Authorities in Support of its Motion for Entry of Consent Decree. On October 6, 2004, the United States and the State of Colorado filed a Complaint against Asarco, Incorporated pursuant to Sections 106, 107 and 113 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9606, 9607 and 9613. The Complaint sought injunctive relief and the recovery of costs incurred by EPA and the State in responding to threats to human health and the environment presented by the Vasquez Boulevard/Interstate 70 Superfund Site ("the Site") located in Denver, Colorado.

Concurrent with the filing of its Complaint, the United States also filed a Notice of

Lodging and a proposed Consent Decree with the Court. The Notice of Lodging informed the Court that the United States had reached a settlement with the Defendant, which was embodied in the proposed Consent Decree. The Notice of Lodging also informed the Court that, pursuant to Section 122(d)(2) of CERCLA, 42 U.S.C. §9622(d)(2), and Department of Justice regulations set forth at 28 C.F.R. §50.7, the United States would publish a notice in the Federal Register informing the public of the proposed Consent Decree and soliciting comments thereon.

Accordingly, on October 21, 2004, the required Notice was published in the Federal Register at 69 Fed. Reg. 61861. The Notice informed the public that the Department of Justice would accept comments on the proposed Consent Decree for a period of thirty days from the date of publication in the Federal Register.

More than thirty days has elapsed since the Federal Register Notice was published and the United States has received no comments from the public objecting to the entry of the proposed Consent Decree or questioning its propriety or reasonableness. Accordingly, the United States moves for entry of the proposed Consent Decree as a final Order of this Court in this case.

A. The Complaint

The Complaint filed by the United States and the State concerns the VB/I-70 Superfund Site, located in Denver, Colorado. The Site is approximately 4.5 square miles in size and encompasses four residential neighborhoods known as Swansea, Elyria, Clayton and Cole, and portions of two other neighborhoods, Globeville and Curtis Park. There are approximately 4,000 residential properties, 10 schools and seven parks within the Site. Emissions from smelters that operated in and near the Site have contaminated the soils and groundwater with a variety of

heavy metals, including lead and arsenic. After conducting several sampling efforts, EPA has determined that the Site presents a threat to human health and the environment. EPA has performed a series of response actions to determine the full nature and extent of the contamination, assess the threats to human health and the environment presented by the Site, and performed several removal actions to clean up the most heavily contaminated properties. To date, EPA has spent approximately \$15 million to perform these studies and cleanup actions. The State has also incurred, and expects to incur in the future, its own response costs.

The Complaint alleges that Asarco is liable based upon its operation of the Omaha & Grant Smelter and the Globe Smelter. Emissions from the smokestacks of both smelters contained a variety of heavy metals that were deposited on the soils at the Site. The Complaint seeks the recovery of costs that have been incurred by EPA and the State at the Site and injunctive relief to compel Asarco to perform the remedial action that EPA selected for the Site.

B. The Settlement

The settlement embodied in the Consent Decree was the product of extensive, arm-length negotiations between the parties. Pursuant to the proposed Consent Decree, Asarco will perform surface soil removals at 100 residential properties at the Site in accordance with the performance standards set forth in EPA's Record of Decision ("ROD"). Based upon its own performance of surface soil removals at other residential properties within the Site, EPA estimates the value of the cleanups that Asarco will perform at approximately \$4.1 million.

The United States believes that the terms of the proposed Consent Decree are well within the scope of the Complaint, further the objectives of CERCLA, and are in the public interest.

The agreement before the Court was reached following the parties' careful and informed assessment of the merits, costs, risks, and delays that litigation would entail, as well as of the value of an early settlement. For the reasons set forth below, the United States believes that the proposed Consent Decree is fair, reasonable, in the public interest, and fully consistent with CERCLA's purposes. We therefore ask the Court to enter the proposed Consent Decree as a final order.

II. STANDARD OF REVIEW APPLICABLE TO CONSENT DECREES

A. General Principles

"The initial decision to approve or reject a settlement proposal is committed to the sound discretion of the trial judge." SEC v. Randolph, 736 F.2d 525, 529 (9th Cir. 1984), quoting Officers for Justice v. Civil Serv. Comm'n, 688 F.2d 615, 625 (9th Cir. 1982); accord, Jones v. Nuclear Pharmacy, Inc., 741 F.2d 322, 324 (10th Cir. 1984); United States v. Jones & Laughlin Steel Corp., 804 F.2d 348, 351 (6th Cir. 1986); United States v. Hooker Chem. & Plastics Corp., 776 F.2d 410, 411 (2nd Cir. 1985); United States v. Union Elec. Co., 132 F.3d 422, 430 (8th Cir. 1997); Kelley v. Thomas Solvent Co., 717 F. Supp. 507, 515 (W.D. Mich. 1989).

Courts, however, usually exercise this discretion in a limited and deferential manner. Indeed, courts accord substantial deference to settlement agreements in general because "[t]he inveterate policy of the law is to encourage, promote, and sustain the compromise and settlement of disputed claims." American Home Assurance Co. v. Cessna Aircraft Co., 551 F.2d 804, 808 (10th Cir. 1977) (quoting Tulsa City Lines v. Mains, 107 F.2d 377, 380 (10th Cir. 1939). See also Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 616 F. 2d 1006, 1013 (7th Cir. 1980) ("the

law generally favors and encourages settlements.”); Van Bronkhorst v. Safeco Corp., 529 F.2d 943, 950 (9th Cir. 1976) (voluntary settlement of disputes is clearly in the public interest); Aro Corp. v. Allied Witan Co., 531 F.2d 1368, 1372 (6th Cir. 1976) (public policy strongly favors settlement of disputes without litigation; “[b]y such agreements are the burdens of trial spared to the parties, to other litigants waiting their turn before over-burdened courts, and to the citizens whose taxes support the latter”); United States v. Akzo Coatings of Am. Inc., 949 F.2d 1409, 1436 (6th Cir. 1991) (there is a “presumption in favor of voluntary settlement”).

Judicial deference to negotiated settlements is particularly appropriate where the government has entered into a consent decree. The Supreme Court has stated perhaps most strongly the significant deference owed to the judgment of the United States in settling a matter:

Sound policy would strongly lead us to decline . . . to assess the wisdom of the Government’s judgment in negotiating and accepting the . . . consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting.

Sam Fox Publ’g Co. v. United States, 366 U.S. 683, 689 (1961).

The Circuit Courts have heeded the Supreme Court’s directive. As the Ninth Circuit has explained, “[t]he policy of encouraging early settlements is strengthened when a government agency charged with protecting the public interest ‘has pulled the laboring oar in constructing the proposed settlement;’” indeed, “a district court reviewing a proposed consent decree ‘must refrain from second-guessing the Executive Branch.’” United States v. Montrose Chem. Corp., 50 F.3d 741, 746 (9th Cir. 1995), quoting United States v. Cannons Eng’g Corp., 899 F.2d 79, 84 (1st Cir. 1990); see also United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.) (the

balancing of interests "must be left, in the first instance, to the discretion of the Attorney General"); United States v. Associated Milk Producers, Inc., 534 F.2d 113, 117 (8th Cir. 1976) ("Attorney General must retain considerable discretion in controlling government litigation and in determining what is in the public interest").

Judicial deference to a settlement negotiated by the government is "particularly strong where a consent decree has been negotiated by the Department of Justice on behalf of a federal administrative agency like EPA which enjoys substantial expertise in the environmental field." Akzo Coatings, 949 F.2d at 1436. Indeed, courts have expressed a presumption in favor of settlement where the governmental agencies charged with enforcing environmental statutes have negotiated a consent decree. Cannons, 899 F.2d at 84; Montrose Chem. Corp., 50 F.3d at 746-47; Kelley v. Thomas Solvent Co., 790 F. Supp. 731, 735 (W.D. Mich. 1991). Such deference is, of course, limited. As the Court noted in United States v. Telluride Co., 849 F. Supp. 1400, 1402 (D. Colo. 1994), while deference to EPA's judgment is appropriate, the court may not abrogate its responsibility to ensure that the decree upholds the important policies of the statute.

B. The Legal Standard to be Applied

"In exercising its discretion, the trial court must approve a settlement if it is fair, reasonable and adequate." Jones v. Nuclear Pharmacy, Inc., 741 F.2d 322, 324 (10th Cir. 1984). See also United States v. Oregon, 913 F.2d 576, 580 (9th Cir. 1990); Montrose Chem. Corp., 50 F.3d at 746; Randolph, 736 F.2d at 529. In reviewing a consent decree, a district court must determine whether the proposed settlement fairly and reasonably resolves the controversy in a

manner consistent with the public interest and applicable law. Jones & Laughlin Steel, 804 F.2d at 351; United States v. Metro. St. Louis Sewer Dist., 952 F.2d 1040, 1044 (8th Cir. 1992); Telluride Co., 849 F. Supp. at 1401-02.

A court is not required to make the same in-depth analysis of a proposed settlement that it would be required to make in order to enter a judgment on the merits after trial:

Because a consent judgment represents parties' determination to resolve a dispute without litigating the merits, the court's role is not to resolve the underlying legal claims, but only to determine whether the settlement negotiated by the parties is in fact a fair, reasonable and adequate resolution of the disputed claims.

United States v. County of Muskegon, 33 F. Supp. 2d 614, 620 (W.D. Mich. 1998), citing Citizens for a Better Env't v. Gorsuch, 718 F.2d 1117, 1126 (D.C. Cir. 1983). Accord United States v. District of Columbia, 933 F. Supp. 42, 46-47 (D.D.C. 1996); Grinnell Corp., 495 F.2d at 462 ("The Court must eschew any rubber stamp approval in favor of an independent evaluation, yet, at the same time it must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case").

After performing its analysis, "the district court is faced with the option of either approving or denying the decree." United States v. Colorado, 937 F.2d 505, 509 (10th Cir. 1991). "The district court judge should not take it upon himself to modify the terms of the proposed settlement decree, nor should he participate in any bargaining for better terms." Id., citing In re General Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1125 n.24 (7th Cir. 1979). "The settlement must stand or fall as a whole." Id., citing Officers for Justice, 688 F.2d at 630. The Court is not to substitute its judgment of what constitutes an appropriate settlement or to reform

the decree. Telluride Co., 849 F. Supp. at 1402.

In sum, the Court's role in reviewing this Consent Decree is limited. Broad deference should be given to EPA's expertise in determining an appropriate settlement and to the voluntary agreement of the parties in proposing the settlement. If the proposed Consent Decree is fair, adequate and reasonable, and consistent with applicable law, it ought to be approved. These standards are met in this case.

III. THE PROPOSED CONSENT DECREE IS FAIR AND REASONABLE, TECHNICALLY ADEQUATE AND CONSISTENT WITH THE PUBLIC INTEREST

Analysis of the proposed Consent Decree reveals that it is fair and reasonable, adequate to address the contamination at the Site, and in the public interest. Accordingly, it should be entered forthwith.

A. The Proposed Consent Decree is Fair and Reasonable

The settlement embodied in the proposed Consent Decree is the product of arms-length negotiations and was negotiated in good faith. Representatives of the United States, the State of Colorado and Asarco spent considerable time and effort pursuing a negotiated settlement of this matter. In determining whether a settlement has been entered into in good faith, the Court stated in City of New York v. Exxon Corp., 697 F. Supp. 677, 693 (S.D.N.Y. 1988), in language equally applicable to the instant case, that no one had "come forward with any evidence, or even conclusory statements, casting doubt on the good faith of the settling parties." In the instant case, there has been no "claim of bad faith or malfeasance on the part of the Government." Sam Fox Publ'g, 366 U.S. at 689.

The proposed Consent Decree also fairly and reasonably reflects the litigation risks and equities present in this case. While the United States would likely have been able to demonstrate that emissions from Asarco's smelters contributed to the contamination at the Site, given the existence of other sources of contamination it would have been difficult or impossible to quantify that portion of the total contamination that was the result of Asarco's operations.^{1/} Given the fact that Asarco is just one of the contributors to the contamination that now exists on the Site, its future obligations pursuant to the proposed Consent Decree are fair and reasonable. The proposed Consent Decree will result in Asarco's performance of the surface cleanup at 100 residential properties at the Site in 2005. Asarco's assumption of this responsibility means that the overall cleanup of all of the affected residential properties will be accelerated. While EPA will continue to perform surface soil removals at other contaminated residential properties at the Site, the proposed settlement reduces by 100 the number of properties that EPA will have to clean up itself.

Limiting Asarco's duties under the proposed Consent Decree to the cleanup of 100 residential properties, and forgoing the recovery of EPA's past costs is also reasonable given Asarco's poor financial condition. Asarco has considerable environmental liabilities nationwide

^{1/} EPA believes that a significant portion of the lead contamination that exists at the Site came from the millions of automobiles that traveled I-70 prior to the time that lead was eliminated as an additive to gasoline. Moreover, because the Site was contaminated via the airborne transport of smokestack emissions, proving the amounts of lead and arsenic that came from Asarco's smokestacks would require sophisticated modeling and the analysis of years of meteorological data. Developing this evidence would obviously be a costly and time consuming exercise.

and is financially incapable of resolving all of these liabilities immediately. In recognition of these facts, the United States and Asarco entered into a consent decree in February 2003, which established a framework for resolving Asarco's outstanding liabilities. United States v. Asarco, Inc. and Southern Peru Holdings (D. Az.). The allocation of the funds to be used for Asarco's performance of the residential cleanups required by the proposed settlement will be handled in accordance with the procedures set forth in the Arizona consent decree.

B. The Proposed Consent Decree is Technically Adequate

Entry of the proposed Consent Decree will result in Asarco's performance of surface soil cleanup at 100 residential properties, thereby reducing the future threats to human health and the environment that are currently presented. The cleanup actions will follow the criteria set forth in EPA's ROD for the Site, which was the subject of an extensive public participation process, and which has been approved by the State. As noted above, EPA is presently implementing its own residential soils cleanup at the Site. The number of properties that EPA can clean up at any one time is, of course limited. By assuming the responsibility to perform cleanups at 100 residential properties in 2005, Asarco will accelerate the overall timetable to achieve complete remediation at the Site. Accordingly, the proposed Consent Decree is technically adequate to protect human health and the environment.

C. The Proposed Consent Decree is in the Public Interest

Entry of the proposed Consent Decree will result in Asarco's cleanup of 100 residential properties that are contaminated with excessive levels of lead and arsenic, which are both hazardous substances as defined in Section 101 of CERCLA, 42 U.S.C. §9601(14). While EPA

was committed to performing cleanups at all residential properties within the Site that contain excessive levels of lead and arsenic, Asarco's agreement to assume responsibility for 100 of these cleanups means the complete remediation of all contaminated residential properties at the Site will occur more quickly. By accelerating the process by which soils containing excessive levels of lead and arsenic will be removed from the Site, the proposed Consent Decree advances the public interest.

IV. CONCLUSION

The United States believes that the settlement embodied in the proposed Consent Decree is consistent with the principles set forth in CERCLA, procedurally and substantively fair, and manifestly in the public interest. Accordingly, the United States requests that the Court approve, sign and enter the proposed Consent Decree as a final judgment of the Court.

Respectfully submitted,

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